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IN THE

Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE, VIRGINIA MILITARY INSTITUTE, NEW RIVER COMMUNITY COLLEGE, AND BLUE RIDGE COMMUNITY COLLEGE,
Petitioners,

v.

BERNARD KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF COMMUNITY COLLEGES, AMERICAN COUNCIL ON EDUCATION AND NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Lum, Sharlene K.S., Brian Moyer and Robert Yuskavage. *Improved Estimates of Gross Product by Industry for 1947-98.* Survey of Current Business (U.S. Department of Commerce, Bureau of Economic Analysis), June 2000: 29, *available at* http://www.bea.gov/bea/articles/national/niparel/2000/0600gpi.pdf 15

Norris, Donald M. & Mark A. Olson, *The Business Value Web – Resourcing Business Processes And Solutions In Higher Education*, 2003, National Association of College and University Business Officers, *available at* http://www.nacubonet.org/eweb/thumbs/NC3045.gif 18, 19

Returning to Our Roots, Executive Summaries of the Reports of the Kellogg Commission on the Future of State and Land-Grant Universities, NUSALGC, *available at* http://www.nasulgc.org/-publications/Kellogg/Kellogg2000_RetRoots_execsum.pdf) 16

State Fiscal Conditions and Higher Education Funding: Improvement Now, Trouble Ahead, AASCU, Vol. 1, No. 2, August 2004, *available at* http://www.aascu.org/pdf/05_pm1_6.pdf 16

Trends in College Pricing 2004, College Board, *available at* http://www.collegeboard.com/prod_downloads/press/-cost04/041264TrendsPricing2004_FINAL.pdf 12

2003 State Issues Digest, AASCU, *available at* http://www.aascu.org/pdf/03_SID.pdf 12

2004 State Issues Digest, AASCU, *available at* http://www.aascu.org/pdf/04_SID.pdf 12

2004-2005 Student Charges and Financial Aid, AASCU – NASULGC, *available at* http://www.nasulgc.org/publications/-05studchrg.jpg 13

U.S. Department of Commerce, Bureau of the Census. Annual Survey of Government, March 2003 (data accessed from http://ftp2.census.gov/govs/apes/-03stus.txt 20

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INTEREST OF THE *AMICI CURIAE*[1]

There are nearly 1,700 state-supported and controlled public colleges, universities, and systems of higher education throughout the United States and its territories (the "State Colleges and Universities"), including approximately 1,000 public associate degree-granting community colleges ("Community Colleges") (collectively called "State Higher Education Institutions").

Amici curiae are non-profit organizations whose members comprise the vast majority of State Higher Education Institutions. Their members collectively enroll three-quarters of the students in American higher education (12.3 million of 16.3 million), including approximately 90% of all students attending Community Colleges (10 million of 11.1 million).

Amici curiae have a substantial interest in the issue presented by this case — whether Congress can use the Article I Bankruptcy Clause (U.S. CONST. ART. I, § 8, cl. 4) to abrogate the sovereign immunity of State Higher Education Institutions — because an affirmative answer to that question would have a significant deleterious impact upon the ability of State Higher Education Institutions to perform their core governmental function of providing quality, affordable public education to their students.

Due to the confluence of what has been described as a "perfect storm" of factors, including a substantial reduction in State funding, ongoing demands of other constituencies

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[1] The parties' letters consenting to the filing of *amicus curiae* briefs have been lodged with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

competing for scarce State funds, expanding and shifting needs of their own core constituency (*i.e.*, existing and prospective students), and changes in business practices, State Higher Education Institutions have been required to diversify and expand their revenue streams beyond the funds provided directly to them by their States. As a result, State Higher Education Institutions are required to deal with more and more third-party commercial vendors and service providers, many of which have national client bases and principal places of businesses or states of incorporation far removed from a given State Higher Education Institution.

A ruling from this Court abrogating the sovereign immunity of State Higher Education Institutions to non-consensual litigation in federal (bankruptcy) courts would, contrary to the consistent jurisprudence of this Court on the issue of sovereign immunity, subject State Higher Education Institutions to litigation in venues potentially far removed from their home States. Such a ruling would expose State Higher Education Institutions to monetary judgments imposing economic burdens on them, and their States, inconsistent with, and inimical to, their duties and responsibilities as State-funded and controlled institutions which use their finite and limited resources to provide quality, affordable public education to their students. Moreover, such a ruling would threaten intrusions upon state sovereign immunity put to rest by this Court's prior decisions, and is not necessary to protect any rights, constitutional or otherwise, of bankruptcy debtors or trustees.

Amicus curiae **American Association of State Colleges and Universities** ("AASCU") is a non-profit organization whose members include more than 430 State Colleges and Universities and university systems throughout the United States and its territories, which are among the most affordable of all four-year colleges and universities, and whose membership is open to any regionally accredited

institution offering programs leading to bachelor's, master's, or doctoral degrees. AASCU institutions enrolled over 3.7 million students in Fall 2003 — 56% of enrollment at all public four-year institutions.

Amicus curiae **American Association of Community Colleges** ("AACC") is a non-profit organization formed in 1920 whose members include more than 1,100 of the nation's Community Colleges, which marked their 100th year of service to the nation in 2001. There are a total of 1,157 Community Colleges in the U.S., including 979 public, 148 private and 30 tribal, which, collectively, have approximately 11.6 million students enrolled (6.6 million for credit and 5 million non-credit). Students at community colleges comprise approximately 46% of all U.S. undergraduates (approximately 45% of first-time freshmen).

Amicus curiae **American Council on Education** ("ACE"), founded in 1918, represents all higher education sectors. Its approximately 1,800 members include a substantial majority of United States colleges and universities. Additionally, ACE serves as the major coordinating body for all of the nation's higher education institutions.

Amicus curiae **National Association of State Universities and Land-Grant Colleges** ("NASULGC"), founded in 1887, is the nation's oldest higher education association. A voluntary association of 214 institutions, including 76 land-grant universities, of which 17 are the historically black public institutions, 31 tribal colleges that became land-grant institutions in 1994 and are represented through the membership of the American Indian Higher Education Consortium ("AIHEC"), and 27 other public higher education systems. NASULGC member campuses are located in all 50 states, the U.S. territories and the District of Columbia. NASULGC members award about three quarters of a million degrees annually, including 39%

of the baccalaureate, 33% of the master's, 56.5% of the doctoral, and 31% of the professional degrees granted annually. NASULGC members also grant 31% of the law and 36% of the medical degrees awarded annually. NASULGC members have educated about half the members of Congress, and nearly half of the CEOs of America's Fortune 100 corporations.

SUMMARY OF ARGUMENT

Petitioners and *amici curiae* are State-created and controlled institutions of higher public education, fulfilling what this Court has acknowledged is "a most fundamental obligation of government to its constituency" (*Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)) — providing quality, affordable public education to their students.

State Higher Education Institutions have generally been considered instrumentalities or "arms" of their States and thus immune from suit; and petitioners are "arms of the state" of Virginia, entitled to sovereign immunity protection. The fact that petitioners, like most State Higher Education Institutions, do not receive *all* their funding from their State does not adversely affect their entitlement to the State's sovereign immunity protection. Nor is their sovereign immunity adversely affected by their increasing engagement in commercial activities with third-party vendors and service providers as required to continue performing their core governmental function.

The confluence of a number of factors has required State Higher Education Institutions to diversify and expand their revenue streams beyond the funds provided directly to them by their States. For example, substantial reductions in State funding for public higher education have forced State Higher Education Institutions to raise tuitions and fees, cut costs, and seek out alternative revenue sources. Tuition increases

are problematic, because they threaten access to public higher education to the segment of the population most vulnerable to rising costs—the nation's low-income, college-qualified high school graduates.

To slow the pace of tuition and fee increases and meet the needs of an expanding student population and technological changes and advancement toward lifelong and remote-access education, State Higher Education Institutions are becoming increasingly involved with the private sector by, *inter alia*, outsourcing auxiliary enterprises (*e.g.*, food services, bookstores, IT and business services, etc.). As a result, State Higher Education Institutions deal with an expanding base of third-party commercial vendors and service providers, many of which have national client bases and principal places of businesses or states of incorporation far removed from the State Higher Education Institutions. This trend is likely to continue in the future, and, in the face of stagnant or decreasing State funding, commercial activities will provide needed funds and additional resources to assist State Higher Education Institutions in delivering educational services to their students.

If the sovereign immunity of State Higher Education Institutions were to be abrogated, or if they otherwise were required to participate in federal (bankruptcy) litigation, their ability to perform their core function would be adversely affected. As shown by their involvement in this case, petitioners have been exposed to litigation in Kentucky due to the fortuitous circumstance that the bookstore operator with whom they entered into contracts filed its bankruptcy case there. If not protected by sovereign immunity, petitioners and other State Higher Education Institutions could be subjected to litigation in federal (bankruptcy court) in any of the 50 States, and could be forced to shoulder litigation burdens which will not exist if their sovereign immunity remained intact. Procedures under Virginia law

both allow and require contract claimants to file claims with the appropriate Virginia State agency, and provide for a judicial remedy in Virginia State courts if the claim is not resolved administratively — a less expensive and more manageable and certain method of resolving contract claims which honors their sovereign immunity.

There is no constitutional right to a discharge in bankruptcy. Voluntary bankruptcy was not known in this country at the adoption of the Constitution, and during the first 110 years of the Nation's life it was without a federal bankruptcy law except for three short periods aggregating about 15 years.

Neither preference actions nor contract claims are the type of *in rem* proceedings relating to the bankruptcy *res* that would justify requiring arms of a State such as State Higher Education Institutions to appear in federal (bankruptcy) court to participate in such proceedings, either through abrogation of sovereign immunity or otherwise. Suits to recover preferences are quintessentially common law suits more nearly resembling state-law contract claims brought by a bankrupt to augment the bankruptcy estate than proceedings related to the bankruptcy *res*. Moreover, the broad preference exception for "ordinary course" payments confirms that there is no "quintessential," constitutional, or statutory bankruptcy right or policy that would compel or support the abrogation of State sovereign immunity to allow bankruptcy trustees to collect purported preference claims in federal (bankruptcy) court.

Allowing an intrusion upon sovereign immunity pursuant to the Article I Bankruptcy Clause would undermine this Court's prior sovereign immunity jurisprudence, and greatly threaten the abilities of State Higher Education Institutions to increasingly participate in commercial activities as required to provide quality and affordable public education to their students.

Without sovereign immunity protection from involuntary litigation, State Higher Education Institutions will be at increased risk not only in the areas of preference claims and contract actions, but also in areas put to rest by prior decisions of this Court, including patent infringement, copyright infringement and/or unfair competition claims.

ARGUMENT

I. STATE HIGHER EDUCATION INSTITUTIONS ARE ENTITLED TO, AND NEED, SOVEREIGN IMMUNITY PROTECTION TO PERFORM THEIR CORE GOVERNMENTAL FUNCTION OF PROVIDING QUALITY, AFFORDABLE PUBLIC EDUCATION TO THEIR STUDENTS

A. State Higher Education Institutions are Entitled to Sovereign Immunity Protection

Providing facilities and opportunities for the pursuit of higher education is a long recognized core governmental function. In *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923), this Court stated, "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."

> Public education, like the police function, "fulfills a most fundamental obligation of government to its constituency." The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions[.]

Ambach v. Norwick, 441 U.S. at 76-77 (citations omitted).[2]

State Higher Education Institutions have generally been considered instrumentalities or "arms" of the States in which they are located, and thus entitled to sovereign immunity protection.[3] In *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997), this Court stated, "[i]t has long been settled that the reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." Observing that "the question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued" (*id.* at 430), this Court concluded that any money judgment obtained on claims asserted by the plaintiff would be a liability of the State, and unanimously determined that the California Board of Regents was an arm of the State entitled to sovereign immunity protection. *Id.* at 431.

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[2] *See also Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (education is necessary to "prepare citizens to participate effectively and intelligently in our open political system"); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (public education is a "most vital civic institution for the preservation of a democratic system of government").

[3] In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996), this Court explained that sovereign immunity transcends the language of the Eleventh Amendment, which simply confirms the presupposition that each State is a sovereign entity in our federal system and not amenable to the suit of an individual without its consent—a concept embodied in this Court's long-standing jurisprudence that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States" (*citing Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

Petitioners are "arms of the state" of Virginia, entitled to sovereign immunity protection. They are "governmental instrumentalities" whose liabilities are paid from the State treasury. *See DeBauche v. Va. Comm. Univ.*, 7 F. Supp. 2d 718, 722 & n.3, n.4 (E.D. Va. 1998). (As State treasury is a major source of funds for university, any judgment against it will be paid from State treasury, and that circumstance alone qualifies university as an "arm of the state." Moreover, requirement of State law [VA. CODE ANN. § 2.2-1802] that funds received by university from outside sources, except endowment funds and student funds and loans, be deposited into State treasury, is an additional factor qualifying university as an "arm of the state.") *See also United States v. Virginia*, 518 U.S. 515, 520-21 (1996) ("From its establishment in 1839 as one of the Nation's first state military colleges, VMI has remained financially supported by Virginia and 'subject to the control of the [Virginia] General Assembly'") (internal cites omitted).[4]

That petitioners (like most State Higher Education Institutions) do not receive *all* their funding from the State does not adversely affect their entitlement to the State's sovereign immunity protection, particularly where, as here, they are designated as State agencies, controlled by State appointed boards, and required to submit their budgets for approval by the State.[5]

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[4] *See, e.g.*, the following sections of the Virginia Code, which are part of Virginia's statutory scheme to create State Higher Education Institutions that are State agencies, governed by bodies appointed by State officials, whose budgets are devised and approved by State officials, and paid, at least in part, directly from the State treasury: VA. CODE ANN. § 23-9.3, 23-9.5, 23-9.6.1, 23-9.9 23-14, 23-92, 23-215, 23-216, and 23-218. All other States have statutory schemes for their public institutions of higher learning.

[5] *See, e.g.*, the following cases in which various U.S. Courts of Appeals determined that State Higher Education Institutions were "arms of the

(footnote continued on next page)

The sovereign immunity afforded petitioners and other State Higher Education Institutions is also not adversely affected by their increasing engagement in commercial activities with third-party vendors and service providers as they diversify the revenue streams and services in their continuing quest to provide quality, affordable public education to their students.

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 684-86 (1999), this Court, observing that "state sovereign immunity, unlike foreign sovereign immunity, is a constitutional doctrine that is meant to be both immutable by Congress and resistant to trends" (*id.* at 686 n.4), and that the "text of the Eleventh Amendment, of course, makes no distinction between commercial and noncommercial state activities" (*id.*), pointed out that state sovereign immunity is no less robust where the State engages in conduct undertaken for profit traditionally performed by private citizens and

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(footnote continued from previous page)
state" entitled to sovereign immunity protection notwithstanding that only a portion of their funding came directly from the State: *Power v. Summers*, 226 F.3d 815, 818-19 (7th Cir. 2000); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 494 (10th Cir. 1998); *Richardson v. So. Univ.*, 118 F.3d 450, 455-56 (5th Cir. 1997); *Hadley v. N. Ark. Comm. Tech. Coll.*, 76 F.3d 1437, 1441 (8th Cir. 1996); *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 575-78 (10th Cir. 1996); *Hutsell v. Sayre*, 5 F.3d 996, 1002 (6th Cir. 1993); *Estate of Ritter by Ritter v. Univ. of Mich.*, 851 F.2d 846, 849 (6th Cir. 1988); *Mitchell v. Los Angeles Comm. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988); *Kashani v. Purdue Univ.*, 813 F.2d 843, 846 (7th Cir. 1987); *Harden v. Adams*, 760 F.2d 1158, 1164 (11th Cir. 1985); *Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299, 307 (6th Cir. 1984); *Ranyard v. Bd. of Regents*, 708 F.2d 1235, 1239 (7th Cir. 1983); *United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 559-61 (5th Cir. Unit A 1982); *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345, 1349-50 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983); *Jagnandan v. Giles*, 538 F.2d 1166, 1175-76 (5th Cir. 1976).

corporations. This Court also pointed out that those factors had not been considered in prior decisions upholding State's sovereign immunity: (i) against admiralty claims where the State was running a tugboat towing service at "fair and reasonable rates" for profit, that was traditionally performed by private citizens and corporations (*Ex parte New York*, 256 U.S. 490, 501 (1921)), or (ii) against an action to recover coupons on bonds issued by a State, the issuance of which rendered the State "a participant in the financial markets" (*Hans v. Louisiana*, 134 U.S. 1, 16-18 (1890)). 527 U.S. at 684-85.

Respondent, as liquidator of a bankruptcy debtor's estate, has brought separate actions against each of petitioners seeking affirmative recoveries of purportedly preferential transfers received in violation of the bankruptcy preference statute, 11 U.S.C. § 547, and for recovery of asserted damages resulting from the purported breach of each petitioner's respective contract with the bankruptcy debtor.

Since petitioners are "arms of the state" of Virginia whose liabilities will be paid by the State, they are entitled to sovereign immunity protection against the claims asserted by respondent.

B. Dynamic Changes Have Required State Higher Education Institutions to Increase Their Revenue Generating Activities and Engagement with the Private Sector

Seventy-three percent of full-time students and 80% of students overall are in State Higher Education Institutions. Almost half of all full-time undergraduate students attend State Colleges and Universities, and another quarter are enrolled in Community Colleges. Due to the confluence of a number of factors, the most significant of which are described below, in order to continue providing quality, affordable public education to these students, State Higher

Education Institutions have been required to become more and more involved with the private sector, thereby increasing the potential negative impact that would result from an abrogation of their state sovereign immunity.

1. Changes in the Funding of State Higher Education Institutions

There has been a significant decrease in funding provided by States to State Higher Education Institutions, forcing them to increase tuitions, cut costs and search out alternative sources of revenue.

The portion of State Higher Education Institutions' revenues from State government appropriations declined from 50% in 1980 to 36% in 2000.[6] Over the past two fiscal years (FY2003 and FY2004), State funding has dropped $2.5 billion (4%), with 29 states posting losses over this period.[7]

State funding is diminishing because entitlements are consuming an ever-larger percentage of both state and federal budgets. For example, by FY2002, K-12 education, Medicaid, and corrections consumed nearly 60% of State general fund spending, a significant increase over FY1992 levels of nearly 49%.[8] Medicaid funding alone increased by 9.3% for FY2003.[9]

To compensate for the reduction in State funding, State

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[6] *See Trends in College Pricing 2004*, College Board, p.4, and Figure 12. (*available at* http://www.collegeboard.com/prod_downloads/press/-cost04/041264TrendsPricing2004_FINAL.pdf) (*last visited* June 16, 2005).

[7] *See 2004 State Issues Digest*, AASCU, p. 7, and Figure 4 (*available at* http://www.aascu.org/pdf/04_SID.pdf) (*last visited* June 16, 2005).

[8] *See 2003 State Issues Digest*, AASCU, p. 18, and Figure 10 (*available at* http://www.aascu.org/pdf/03_SID.pdf) (*last visited* June 16, 2005).

[9] *See 2004 State Issues Digest*, at p. 6, and Figure 3.

Higher Education Institutions have been forced to raise tuitions and fees, cut costs, and seek out alternative revenue sources. Between 1980 and 2000, tuition and fees at State Colleges and Universities rose from 13% to 18% of institutional revenues. According to the College Board, tuition and fees have been growing faster than the rate of inflation since the early 1980s. From 1994–1995 to 2004–2005, tuition and fees at public four-year colleges and universities increased 51% ($1,725) in constant (inflation-adjusted) dollars, with the sharpest spike occurring over the past two years; and tuition and fee increases far outpaced inflation again in 2004, rising 10.5% at State Colleges and Universities and 8.7% at Community Colleges.[10]

Raising tuition and fees to offset reduced State funding, although necessary, is problematic for a number of reasons, the most important of which is that it threatens access to higher education by raising economic barriers to attendance to the segment of the population most vulnerable to rising costs—the nation's low-income, college-qualified high school graduates. Financial aid to assist in paying the cost of tuition and fees is becoming less and less available to students from low income families. The trend of the past decade has seen a decrease in grant aid as a proportion of total aid, while loans have increased. In 2003–2004, loans constituted 56% of all postsecondary aid, while grants comprised 38%, and work-study/tax credits accounted for the rest. In 2003–2004, grant aid grew by 8% over 2002–2003, while loan dollars grew by 19%.[11] Today, the

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[10] *See Correcting Course, How Can We Restore the Ideals of Public Higher Education in a Market-Driven Era*, The Futures Project: Policy for Higher Education in a Changing World, p. 3. (*available at* http://www.futuresproject.org/publications/Correcting_Course.pdf) (*last visited* June 16, 2005).

[11] *See 2004-2005 Student Charges and Financial Aid*, AASCU – NASULGC, p. 9 (*available at* http://www.nasulgc.org/publications/-

(footnote continued on next page)

financial aid system requires low-income students to cover an average of $3,800 in college-related expenses per year at State Higher Education Institutions—a sum that forces many to delay or abandon their studies.[12]

This situation is exacerbated at Community Colleges, because they serve higher percentages of students from low-income families than do other sectors of higher education. The Fall of 2004 marked the third consecutive year of significant increases in tuition and fees largely caused by continuing shortages in state and local funding. Simultaneously, enrollments have been surging, especially in high-demand, high-cost technical programs such as nursing and information technology. Community Colleges already educate more than 60% of nurses and other health-care professionals, and a recent survey shows these programs continue to be the fastest growing, in response to a severe national need.[13]

Due, in part, to the threat to access posed by increasing tuition and fees and the skewed financial aid system, State Higher Education Institutions have been forced to find alternative sources of revenue, including revenues from auxiliary enterprises (*e.g.,* food services; bookstores; IT and business services).

For all State Higher Education Institutions, the future presents an environment that will be characterized by reduced state appropriations, and in which tuition increases

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(footnote continued from previous page)
05studchrg.jpg) (*last visited* June 16, 2005).

[12] *Correcting Course*, p. 2.

[13] *See* Comments of George R. Boggs, President and CEO, American Association of Community Colleges (*available at* http://www.collegeboard.com/press/cost04/trends.html) (*last visited* June 16, 2005).

and commercial activities will provide needed funds so that they can continue to provide quality, affordable public education to their students.

2. Changes in the Structure of the Economy

Over the past half century, there has been a marked shift in the bulk of U.S. economic activity from goods production to service and information production, which has had a negative impact on State tax revenues available to fund public higher education.

According to the U.S. Department of Commerce, from 1947 to 1998, goods production fell from about 40% of Gross Domestic Product ("GDP") to about 20%, while service production (including knowledge and information services) jumped from about 45% of GDP to about 65%.[14]

Most State tax structures were developed when the economy was far more dependent on goods production than on information or service production. The recent recession and accompanying fiscal slide has made clear that the tax bases of States who have failed to include a broad array of services in their taxes will shrink over time, resulting in structural deficits in State budgets confronted with rising education and health care demands of a society that is simultaneously aging and forced to compete globally. A recent analysis by the Rockefeller Institute revealed that 39 states currently have structural deficits, including some of

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[14] *See* Lum, Sharlene K.S., Brian Moyer and Robert Yuskavage. *Improved Estimates of Gross Product by Industry for 1947-98.* Survey of Current Business (U.S. Department of Commerce, Bureau of Economic Analysis), June 2000: 29 (*available at* http://www.bea.gov/bea/articles/national/niparel/2000/0600gpi.pdf) (*last visited* June 16, 2005).

the largest and fastest-growing.[15]

This scenario provides yet another compelling reason and need for State Higher Education Institutions to diversify and expand their revenue streams so that they will have the funds needed to perform their core governmental function.

3. Changes in the Needs of Their Core Constituency (*i.e.*, Existing and Potential Students)

Just as the bulk of U.S. economic activity has shifted markedly from goods production to service and information production, there has also been a remarkable shift and growth in demand for education throughout the lifetime of virtually every citizen; and a further demand for institutions of higher education to "reach out" to satisfy this need with the greatest quality and efficiency possible.

The importance and benefits of lifelong learning was emphasized by responses of decision makers in K–12 and higher education to a survey where they strongly agreed that lifelong learning promotes individual well-being, benefits corporate productivity, is important to the country's economic prosperity, and enhances the quality of community life. More than eight in 10 of them also agreed that lifelong learning is important to the security of the nation, is a national priority, and promotes family preservation.[16]

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[15] *See State Fiscal Conditions and Higher Education Funding: Improvement Now, Trouble Ahead*, AASCU, Vol. 1, No. 2, August 2004, p. 2 (*available at* http://www.aascu.org/pdf/05_pm1_6.pdf) (*last visited* June 16, 2005).

[16] *See Returning to Our Roots, Executive Summaries of the Reports of the Kellogg Commission on the Future of State and Land-Grant Universities*, p. 20, NASULGC (*available at* http://www.nasulgc.org/-publications/Kellogg/Kellogg2000_RetRoots_execsum.pdf) (*last visited* June 16, 2005).

Not only are State Colleges and Universities suitable places for lifelong learning programs, so too are Community Colleges, because they can provide educational opportunities and service to the members of their local communities with minimal geographic and economic barriers.

To satisfy the burgeoning demand for lifelong learning, State Higher Education Institutions must provide a wide variety of teaching and learning opportunities and approaches, ranging from traditional on-campus instruction to internet-based courses. They must also form partnerships with business and professional associations to plan for and meet the educational needs of the workforce on a timely basis through on-campus classroom instruction, on-site instruction in workplaces, and distance learning. They must also embrace emerging information technologies, including new interactive, multimedia technologies, as tools for enriching learning by tailoring instruction to societal, organizational, and individual needs.

Funds are obviously needed to accomplish these ambitious goals and requirements, and in today's environment of shrinking State funding and explosive and dynamic growth and change in the information technology market, State Higher Education Institutions must inevitably engage in commercial activity with third-party vendors, service providers, and businesses whose employees will become the "consumers" of the educational services provided.

4. Changes in Business Practices

Changes in business practices, coupled with the resource constraints brought about by decreased state funding, and the needs to reduce costs and enhance the quality of products, services and experiences for their students, have resulted in State Higher Education Institutions outsourcing a number of auxiliary services that historically were performed by them

"in-house." In addition to saving money, such outsourcing has improved campus efficiency and the quality of services and the educational experience for their students.

A complex array of options are presented to State Higher Education Institutions, including the privatization of auxiliary services such as bookstores, food services, residence halls, buildings and grounds; as well as other auxiliary services, such as IT outsourcing, business process outsourcing, application service providers, expert services, shared services, and process reinvention. Drivers for IT outsourcing, in particular, include pressure on budgets for both capital and operating costs; the shift to web-based technologies; integration of IT technologies into operations functions; scarce IT architectural and engineering staff resources; and various competitive pressures expressed through administrative, academic, education, and research demands. Leading technology companies have elevated their status from "vendors" to "solution providers;" and web services are enabling the seamless integration of loosely coupled services for parts of business processes.

State Higher Education Institutions are dealing with a broad range of outsourcing providers for auxiliary services and processes. They range from large firms offering auxiliary services outsourcing (*e.g.*, Barnes & Noble, Sodhexo, Aramark), to franchise operations (*e.g.*, Burger King, Chick Fil-A, Little Dinos), to local markets and merchants (*e.g.*, flower shops, boutiques, other specialty providers).[17]

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[17] Donald M. Norris & Mark A. Olson, *The Business Value Web – Resourcing Business Processes And Solutions In Higher Education*, 2003, National Association of College and University Business Officers, p. 5 (*available at* http://www.nacubonet.org/eweb/thumbs/NC3045.gif) (*last visited* June 16, 2005).

According to the National Association of College and University Business Officers ("NACUBO"), as of 2002 over 90% of institutions outsource at least one campus service and almost 80% outsource two or more services, an increase of almost 10% over 2000 levels. Cost savings and improving quality of services were far and away the primary reasons given by institutions for considering outsourcing.[18]

In addition to the direct cost savings and the improved campus efficiency, quality of services and educational experience, State Higher Education Institutions have also discovered that outsourcing auxiliary services and processes has been both an economic driver to the production of jobs in the local community, and improved the quality of the educational experience for their students by further engaging the community in which they are located. Indeed, it is likely that any retrenchment on the part of State Higher Education Institutions as to outsourced auxiliary services and processes would be perceived negatively and met with resistance in their local communities.

The current state of financial exigency confronting State Higher Education Institutions promises to make outsourcing decisions ever more complex and important. Engaging in such outsourcing is a necessary requirement for State Higher Education Institutions seeking cost savings, productivity enhancements, ways of creating genuine synergies that add value for them and their students, and diversified and expanded revenue streams.

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[18] *Id.* at p. 4.

II. ABROGATING SOVEREIGN IMMUNITY WOULD SUBSTANTIALLY HAMPER STATE HIGHER EDUCATION INSTITUTIONS IN PROVIDING QUALITY, AFFORDABLE PUBLIC EDUCATION, WOULD BE INCONSISTENT WITH THIS COURT'S PRIOR DECISIONS, AND IS NOT NECESSARY TO PROTECT ANY CONSTITUTIONAL OR OTHER RIGHTS OF BANKRUPTCY DEBTORS OR TRUSTEES

State Higher Education Institutions still remain a large component of State governments in terms of State discretionary spending, and the staffs of State Higher Education Institutions comprise a large portion of State workforces.[19] Abrogation of their sovereign immunity, therefore, would have a disproportionately large impact on State Higher Education Institutions.

Due to the confluence of factors discussed above, including State funding constraints, pressures to keep down tuition and fee hikes, and need to cut costs, State Higher Education Institutions must increasingly outsource their ancillary operations, such as dining and residential services, IT services, and, in particular, bookstores—which are the subject of respondent's claims against petitioners in this case.

[19] As of March 2003, higher education comprised 36% of States' full-time workforce and 45% of States' total workforce. *See* U.S. Department of Commerce, Bureau of the Census. Annual Survey of Government, March 2003 (data accessed from http://ftp2.census.gov/govs/apes/-03stus.txt) (*last visited* June 16, 2005).

A. Abrogating Sovereign Immunity to Require State Higher Education Institutions to Adjudicate Claims in Bankruptcy Court Causes Them Harm and is Not Necessary

Petitioners find themselves as defendants in federal (bankruptcy) court outside the borders of their home state due to circumstances over which they had no control—their selection of a now-bankrupt bookstore operator as the entity to which they outsourced the operation of their campus bookstores.

Notwithstanding that petitioners each entered into contracts governed by Virginia law for the performance of services in Virginia, simply because their bookstore operator's principal place of business, state of incorporation, and/or principal assets were located in Kentucky, they have been exposed to litigation in Kentucky where the bankruptcy case was filed. *See* 28 U.S.C. § 1408. Given the permutations of venue for filing bankruptcy cases, as well as adversary proceedings associated with bankruptcy cases, if not protected by sovereign immunity, petitioners and other State Higher Education Institutions could be subjected to litigation in federal (bankruptcy court) in any of the 50 States. *See* 28 U.S.C. § 1409(a).

Moreover, having been subjected to litigation in a bankruptcy court outside the borders of their home State, in addition to having to shoulder the expense and burden of defending themselves through the offices of the Virginia Attorney General, who is charged with providing their defense (*see* VA. CODE ANN. § 2.2-507), petitioners are also required to have their statutorily designated counsel seek permission from the Kentucky federal (bankruptcy) court to appear and represent them; and, depending upon the discretionary determination of that Court, may be required to

retain counsel who is admitted to the bar of that court.[20]

If their sovereign immunity were abrogated, petitioners, in addition to being subjected to litigation in the federal (bankruptcy) court located outside Virginia, would also be required to shoulder litigations burden which would not exist if their sovereign immunity remained intact. As to respondent's contract claims, under Virginia law, a pecuniary claimant is required to file his claim with, *inter alia*, the head of the institution responsible for the alleged act or omission giving rise to the claim. *See* VA. CODE ANN. § 2.2-814.A. Said institution head is then required to forward that claim without unreasonable delay and with appropriate supporting papers and recommendations to the Virginia Comptroller, who is required to promptly allow the amount that appears to be due. *See* VA. CODE ANN. § 2.2-815.A. If respondent had followed such procedure, his claims might have been allowed by Virginia's Comptroller—thereby obviating any need for petitioners to be engaged in litigation whatsoever or to incur any litigation expenses. If the Comptroller had denied respondent's claims, then respondent would have a perfect remedy under Virginia law to bring an action to seek recovery *in Virginia*. *See* VA.

[20] *See* Joint Local Rules of Civil Practice for the United States District Courts for the Eastern and Western Districts of Kentucky, LR 83.2 and 83.4. (*available at* http://www.kyed.uscourts.gov/rules/Civil_Rules-2.pdf) (*last visited* June 16, 2005). This is a practice adhered to in all federal (bankruptcy) courts; and, indeed, many courts require the retention of local counsel as a condition to the admission of out-of-state counsel. *See, e.g.*, LR 83.1.B(2), Local Court Rules for the United States District Court for the Northern District of Georgia (requiring attorney appearing *pro hac vice* to designate local member of bar of court with whom the opposing counsel and court may readily communicate regarding the conduct of the case and upon whom papers shall be served) (*available at* http://www.gand.uscourts.gov/localrules.htm) (*last visited* June 16, 2005).

CODE ANN. § 8.01-192, *et seq.*[21]

In sum, if their sovereign immunity were to be abrogated, State Higher Education Institutions would be required to divert an unknown amount of their scarce resources away from funding educational services to paying costs, expenses, and potential judgments they could face as defendants in federal (bankruptcy) litigation.

B. There are no Bankruptcy Rights, Constitutional or Otherwise, to Justify Abrogating the Sovereign Immunity of State Higher Education Institutions

There is no constitutional right to a discharge in bankruptcy, and neither preference actions nor contract claims rise to the level of *in rem* proceedings that would justify requiring State Higher Education Institutions to appear in federal (bankruptcy) court to participate in such proceedings.

As this Court stated in *United States v. Kras*, 409 U.S. 434, 446-47 (1973):

> There is no constitutional right to obtain a discharge of one's debts in bankruptcy. The Constitution, Art. I, § 8, cl. 4, merely authorizes the Congress to 'establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.' Although the first bankruptcy law in England was enacted in 1542, and a discharge provision first appeared 1705, primarily as a reward for cooperating debtors, voluntary bankruptcy

[21] While presenting a survey of State law on this subject is not within the scope of this brief, *amici curiae* respectfully represent that all other States have judicial and/or administrative processes and procedures in place similar to those of Virginia for dealing with claims arising out of contracts for goods and services with State agencies or instrumentalities.

> was not known in this country at the adoption of the Constitution. Indeed, for the entire period prior to the present Act of 1898, the Nation was without a federal bankruptcy law except for three short periods aggregating about 15 1/2 years. . . . Professor MacLachlan has said that the development of the discharge 'represents an independent . . . public policy in favor of extricating an insolvent debtor from what would otherwise be a financial impasse.' But this obviously is a legislatively created benefit, not a constitutional one, and, as noted, it was a benefit withheld, save for three short periods, during the first 110 years of the Nation's life.

(internal citations omitted). As to preference and contract actions sought to be pursued in bankruptcy proceedings, this Court, in *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94-95 (1932), stated:

> In England, long prior to the enactment of our first Judiciary Act, common-law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts. Suits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it.

(citations omitted). Moreover, in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), this Court, citing to *Schoenthal*, and discussing both fraudulent conveyance and preference actions brought by bankruptcy trustees, described such suits as:

> quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy *res*.

Id. at 56. In *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 454 (2004), this Court acknowledged the differences between preference actions and an *in rem* action pertaining to the bankruptcy *res*, stating:

> Clearly dismissal of the complaint is not appropriate as the court has *in rem* jurisdiction over the matter, and the court here has not attempted to adjudicate any claims outside of that jurisdiction. The case before us is thus unlike an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference.

See also United States v. Nordic Village, 503 U.S. 30, 38 (1992), in which this Court, in the context of a suit against the federal government to recover a post-bankruptcy transfer of funds by a debtor, stated:

> Respondent sought to recover a sum of money, not "particular dollars," so there was no *res* to which the court's *in rem* jurisdiction could have attached, In any event, we have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists.

(internal citations omitted).

Moreover, considering that not all payments made by a debtor prior to bankruptcy are preferences—and, indeed, that payments made in the ordinary course of business in accordance with ordinary business terms are *not* preferences—there is no compelling reason why sovereign immunity protection should be abrogated, or "arms of the state," including State Higher Education Institutions, otherwise required to defend against such actions.

In *Union Bank v. Wolas*, 502 U.S. 151, 153 (1991), this Court, discussing 11 U.S.C. § 547, acknowledged that payments on debts incurred in the ordinary course of

business or financial affairs of the debtor and the transferee, which are made according to ordinary business terms, and in the ordinary course of business, are not preferences. This Court then determined that the "ordinary course" exception applied to long-term as well as short-term debt, since, *inter alia*, excepting both types of payments furthered the policy of deterring creditors from "racing to the courthouse" to dismember the debtor or refusing to continue dealing with the debtor. *Id.* at 162.

The payments which respondent seeks to recover from petitioners were made pursuant to on-going contractual relations between each petitioner and the bankruptcy debtor; therefore, it is quite possible, if not likely, that they were "ordinary course" payments, *not* preferences. Regardless of the ultimate outcome if petitioners were forced to litigate the issue in federal (bankruptcy) court, the critical point to note is that the broad preference exception for "ordinary course" payments confirms there is no "quintessential," constitutional, or statutory bankruptcy right or policy that would compel or support the abrogation of State sovereign immunity to allow bankruptcy trustees to collect purported preference claims from "arms of the state," including State Higher Education Institutions.

C. Article I of the U.S. Constitution Does Not Authorize Congress to Abrogate State Sovereign Immunity in Bankruptcy Cases

In *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 101-02 (1989), in which this Court concluded that Congress had not validly abrogated States' sovereign immunity pursuant to 11 U.S.C. § 106(c), Justice Scalia, concurring, presaged this Court's later rulings as to Congress' lack of authority to use Article I of the U.S. Constitution to abrogate States' sovereign immunity. He stated that:

> it makes no sense to affirm the constitutional principle established by *Hans v. Louisiana*, that "'a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued,'" and to hold at the same time that Congress can override this principle by statute in the exercise of its Article I powers.

Id. at 105 (internal citations omitted). Subsequent to *Hoffman*, this Court has issued a series of opinions which have consistently held that Congress may not use its Article I powers to abrogate States' sovereign immunity.[22] These cases clearly establish that: (i) the powers delegated to Congress under Article I of the United States Constitution do not include the power to abrogate States' sovereign immunity from suit in federal or state courts;[23] and (ii) while States

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[22] *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (Indian Commerce Clause—Indian Gaming Regulatory Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (Commerce Clause and Patent Clause—Patent and Plant Variety Protection Remedy Clarification Act); *Coll. Sav. Bank*, 527 U.S. 666 (1999) (dormant Commerce Clause—Trademark Remedy Clarification Act and Lanham Act); *Alden v. Maine*, 527 U.S. 706 (1999) (Necessary and Proper Clause (and Supremacy Clause)—Fair Labor Standards Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Commerce Clause—Age Discrimination in Employment Act ("ADEA")); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Commerce Clause—Americans with Disabilities Act). *See also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) (suit against State and State officials by Indian tribe to quiet title barred by sovereign immunity); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (in Religious Freedom Restoration Act of 1993, Congress did not validly abrogate State sovereign immunity pursuant to Fourteenth Amendment, Clause 5).

[23] *See e.g., Seminole Tribe*, 517 U.S. at 73; *Fla. Prepaid*, 527 U.S. at 647-48; *Coll. Sav. Bank*, 527 U.S. at 683-84; *Alden*, 527 U.S. at 732-33; *Kimel*, 528 U.S. at 79-80; and *Garrett*, 531 U.S. at 364.

may waive their sovereign immunity and consent to be sued in federal courts, that consent must be unequivocal, and cannot be inferred from receipt of funds, acquiescence, or engaging in commercial conduct.[24]

While this Court has not specifically addressed the question presented in this case, *i.e.*, whether Congress can use its Article I powers to establish uniform laws on bankruptcy to abrogate States' sovereign immunity from suit in federal courts, in *Seminole Tribe*, this Court also presaged its analysis of this specific issue when, in a footnote addressing comments in the dissent of Justice Stevens, it stated:

> it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes; . . . Although the copyright and bankruptcy laws have existed practically since our Nation's inception, and the antitrust laws have been in force for over a century, there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States.

Seminole Tribe, 517 U.S. at 73, n.16 (internal citations omitted).

In *Tennessee Student Assistance Corp. v. Hood*, this Court held that the undue hardship determination sought by the debtor could be adjudicated by the federal (bankruptcy) court in the exercise of its *in rem* jurisdiction over the bankruptcy *res* (*i.e.*, the debtor and his estate) without affronting State sovereignty (541 U.S. at 441), and therefore,

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[24] *See e.g.*, *Seminole Tribe*, 517 U.S. at 58-59; *Fla. Prepaid*, 527 U.S. at 635; *Coll. Sav. Bank*, 527 U.S. at 676-85.

that such undue hardship determination was not a suit against the State for sovereign immunity purposes. *Id.* at 451. In clarifying its holding in response to comments in the dissent of Justice Thomas, this Court observed:

> This is not to say, "a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity," . . . but rather that the court's exercise of its *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State. Nor do we hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State.

Id. at 451, n.5 (internal citations omitted).

Amici curiae respectfully submit that this Court's prior jurisprudence on sovereign immunity, and the nature and scope of bankruptcy *in rem* jurisdiction, require a determination that Congress may not use the Article I Bankruptcy Clause (U.S. CONST. ART. I, § 8, cl. 4) to abrogate the sovereign immunity of State Higher Education Institutions.

Furthermore, allowing such an intrusion upon sovereign immunity pursuant to Article I would, *amici curiae* respectfully submit, undermine this Court's prior jurisprudence and greatly threaten the abilities of State Higher Education Institutions to increasingly participate in commercial activities as required to provide quality, affordable public education to their students.

Without sovereign immunity protection from involuntary litigation, State Higher Education Institutions will be at increased risk not only in the areas of preference and contract claims discussed herein, but also in areas put to rest by prior decisions of this Court. By way of example, if State sovereign immunity can be abrogated so as to allow non-consensual bankruptcy litigation against "arms of the state," what is to stop a bankrupt debtor or trustee from asserting

patent infringement, copyright infringement, unfair competition, and/or other claims against States or State Higher Education Institutions previously put to rest by this Court's prior decisions?

CONCLUSION

For the foregoing reasons, the question presented should be answered in the negative, and the judgment of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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